

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 1, 2012

v

DEONDRE KENYETTA ELIE,

Defendant-Appellant.

No. 299605
Wayne Circuit Court
LC No. 06-007727-FH

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

This case is before this Court for the third time after the trial court resentenced defendant to prison terms of two to five years each for his convictions of carrying a concealed weapon (“CCW”), MCL 750.227, and third-degree fleeing or eluding a police officer, MCL 257.602a. We affirm.

Defendant’s convictions arise from an incident in which he drove a vehicle at an excessive speed through a residential neighborhood while fleeing the police. During the chase, a passenger disposed of a loaded assault rifle.¹ Defendant and his passenger later attempted to flee on foot, but were apprehended by the police. In defendant’s first appeal, this Court affirmed defendant’s convictions and felony-firearm sentence, but vacated his prison sentences of two to five years each for the CCW and fleeing or eluding convictions and remanded for resentencing on those offenses. *People v Elie*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 275081) (“*Elie I*”). This Court concluded that resentencing was required because defendant’s sentencing guidelines range was zero to nine months, and the trial court failed to adequately justify its decision to depart from the guidelines range by imposing prison sentences rather than an intermediate sanction. *Id.*

At defendant’s first resentencing, the trial court again imposed prison sentences of two to five years each for the CCW and fleeing or eluding convictions, relying principally on defendant’s substantial accumulation of prison misconduct tickets to justify its departure from

¹ Defendant was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b.

the guidelines. Defendant again appealed, and this Court once again determined that resentencing was required. *People v Elie*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2010 (Docket No. 289068), (“*Elie II*”). Although this Court concluded that defendant’s lengthy record of prison misconduct tickets provided a substantial and compelling reason to depart from the guidelines range, it determined that resentencing was necessary because the trial court “neglected to articulate an explanation for the extent of the departure independent of the reason it decided on a departure, and did not specifically describe any connection between the reasons supporting the departure and the extent of the sentence departure it imposed.” *Id.* at 4.

In June 2010, defendant was resentenced for the second time and the trial court again imposed the same sentence of two to five years for each conviction. Defendant was awarded credit of 1,446 days served against his CCW sentence, and credit of 735 days served against his sentence for the fleeing or eluding conviction.

On appeal, defendant argues that the trial court failed to articulate proper reasons to depart from the sentencing guidelines, and also failed to justify the extent of the departure imposed, resulting in disproportionate sentences. However, in *Elie II*, unpub op at 3, this Court concluded that the prison misconduct tickets provided a substantial and compelling reason to depart from the guidelines range. Defendant’s accumulation of misconduct tickets continued between the time of defendant’s first and second resentencing. Consistent with the decision in *Elie II*, defendant’s numerous misconduct tickets provided a substantial and compelling reason for sentencing defendant to the Department of Corrections, rather than imposing an intermediate sanction. Accordingly, the trial court did not abuse its discretion in determining that prison sentences were warranted.

With respect to defendant’s argument that the trial court failed to justify the particular prison sentences imposed, “[t]he ‘principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.’” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008), quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). “Such a review considers ‘whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record[.]’” *Id.* at 305, quoting *Babcock*, 469 Mich at 262. We conclude, however, that defendant’s proportionality challenge is moot. We have already concluded that the trial court did not abuse its discretion in imposing sentences of imprisonment. With respect to the lengths of defendant’s sentences, because defendant has already fully served his minimum sentences, we would not be able to fashion a remedy even if we were to agree with defendant’s argument. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Accordingly, defendant’s proportionality challenge is moot. *Id.*

Nonetheless, even if the issue was not moot, we would conclude that the trial court adequately justified the extent of the departure. The trial court explained that defendant’s substantial accumulation of prison misconduct tickets showed that he was not suitable for community supervision and that his prospects for rehabilitation were bleak. The court stated that it had considered imposing three-year minimum sentences, but rejected that option because a 36-month sentence did not appear in any cell on the grid for Class E offenses. The trial court

satisfied the requirement in *Smith* that a court explain why the particular departure was appropriate.

In *Smith*, 482 Mich at 310, the Court suggested that “a comparison of a defendant’s characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise” for the trial court and “will aid an appellate court in reviewing the proportionality of the departure.” Defendant was convicted of a Class E offense and was assigned ten prior record variable (PRV) points,² which placed him in PRV level C. He was assigned zero offense variable (OV) points, which placed him in OV level I. The court’s reasons for departure focused on defendant’s post-conviction behavior, rather than the circumstances of the offense. Even for an offender with a lengthy prior record, a 24-month sentence for defendant’s conduct would have been a departure. MCL 777.66. The highest possible minimum sentence within the guidelines range for someone in defendant’s PRV level is 24 months, which is the same as defendant’s minimum sentences. The trial court’s selection of a two-year prison sentence for concealing a weapon in a vehicle and fleeing from the police for an offender with no prior criminal history, but with an extraordinary record of disobedience of prison rules and defiance of prison authorities, is within the range of principled outcomes and, therefore, was not an abuse of discretion. *Babcock*, 469 Mich at 269-270.

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

² Defendant had no prior criminal record, but received ten points for PRV 7, for the concurrent felony convictions. MCL 777.57.